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NOTES

LEGALITY OF "BANK NIGHTS" IN KENTUCKY

Section 226 of the Kentucky constitution provides:

"Lotteries and gift enterprizes are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."¹

In pursuance of this provision of the Constitution the General Assembly of Kentucky in 1892 passed a law prohibiting lotteries and gift enterprizes and provided for penalties for those who conducted them.² In 1938 this statute was re-enacted with the following addition:

"Provided, however, that the words 'lottery or gift enterprize' as used in this section shall not apply to any gift of money, property or other thing of value which is awarded by lot or drawing by mercantile establishments, theatres or newspapers who make such awards to their customers and patrons, and who charge no price or collect no fee for the privilege of participating in such lot or drawing other than the regular price of the merchandise sold, or admission tickets, or subscription price to all customers and patrons whether they participate or do not participate in such awarding."³

This amendment to the lottery statute was an attempt by the state legislature to expressly legalize "Bank Night" as practiced by the various movie theatres in the state, as well as to approve the practice by mercantile establishments of giving away cash prizes to patrons of their establishments.

At Common law lotteries were not illegal and were declared so only when they became a public nuisance.⁴ In the early history of the United States, the practice of conducting lotteries was wide spread and the state legislatures often granted charters to persons and schools to conduct lotteries for public charities. At one time the Continental Congress resorted to a lottery to obtain funds for its purposes.⁵

Recognizing lotteries to be an undesirable form of gambling,

¹ Kentucky Constitution, sec. 226.

² Kentucky Statutes (Carroll, 1936) sec. 2573.

³ Kentucky Statutes (Carroll, 1936-1940 Supp.) sec. 2573.

⁴ See *Lee v. City of Miami*, 121 Fla. 93, 163 So. 486, 489 (1935) (Dictum).

⁵ For interesting discussion of history of lottery in the United States see *supra* note 4, at 488.

all of the states have by constitutional provision, or by acts of the state legislature, prohibited lotteries. The prohibition has usually been in the form of the general terms "lotteries and gift enterprises" leaving to the courts the burden of defining those terms. The result has been a lack of uniformity among the states as to what constitutes a lottery.

Generally, a lottery is defined as a scheme for the distribution of prizes or things of value, by lot or chance among persons who have paid, or agree to pay a valuable consideration for the chance to share in the distribution.⁶ Three elements are necessary; prize, chance, and a *consideration*.⁷ Since in "Bank Night" the elements of prize and chance are admittedly present the only element which has been the subject of disagreement among the courts is that of the presence of consideration. If consideration is present "Bank Nights" are lotteries within the definition of the courts.

The Court of Kentucky has not yet stated its view upon the matter.⁸ There have, however, been decisions upon this matter in a great number of courts. The Court of Tennessee found no consideration when the price of admission was no more than the regular price, and it was not necessary to have an admission ticket in order to claim the prize.⁹ Courts of other states have stated the same opinion, saying that the benefit derived from increased advertising and patronage was too remote to come within the definition of consideration.¹⁰ This view is supported

⁶ National Conference on Lotteries v. Farley, 96 F. (2d) 861 (1938); Central States Theatre Co. v. Patz, 11 Fed. Supp. 566 (1935); People v. Cardas, 137 Cal. App. 788, 28 P. (2d) 99 (1933); People v. Heckt, 119 Cal. App. 778, 3 P. (2d) 399 (1931); People v. Worley, 275 Ill. App. 378 (1935); State v. Emerson, 318 Mo. 633, 1 S. W. (2d) 109 (1927).

⁷ *Supra*, n. 6.

⁸ In Worden v. City of Louisville, 279 Ky. 712, 131 S. W. (2d) 923 (1939), the Kentucky Court refused to pass upon the question objecting to the manner in which the case was brought before the court.

⁹ State v. Crescent Amusement Co., 170 Tenn. 351, 95 S. W. (2d) 310 (1936).

¹⁰ State v. Hundling, 220 Iowa 1369, 264 N. W. 608 (1936); Commonwealth v. Wall, 295 Mass. 70, 3 N. E. (2d) 28 (1935); State v. Stern, 201 Minn. 139, 275 N. W. 626 (1937); State v. Eames, 87 N. H. 477, 183 Atl. 590 (1936); People v. Shafer, 160 Misc. 174, 289 N. Y. Supp. 649, affirmed 273 N. Y. 475, 6 N. E. (2d) 410 (1937); Darlington Theatres v. Coke, 190 S. C. 282, 2 S. E. (2d) 782 (1939).

by saying that consideration must move from the party to benefit by the drawing,¹¹ and must be pecuniary in nature.¹²

In the majority of the states, however, "Bank Night" has been condemned as a lottery.¹³ The argument is, that in fact consideration does move from those participating in the drawing when some of those who participate do buy tickets, and even the fact that some do not pay does not take the scheme outside the operation of lottery laws.¹⁴ Some decisions are based on the theory that the real consideration is the increased attendance and the resulting gain made by the operator of the enterprise.¹⁵

The Court of Wisconsin goes so far as to say in the case of prizes given on free coupons at drug stores, that the mere fact that customers had to enter the store each day to get a coupon was consideration.¹⁶ This view is best set out by the Court of Delaware when it says: "Consideration need not consist of money but of an act done at the request of the proprietor of the scheme upon the reasonable and realistic view that the act is bargained for."¹⁷

The court of one state even looked to the extent of the practice in the community to aid it in determining whether certain practice was lottery.¹⁸

But the legislature in Kentucky has made an exception in the case of "Bank Night" from the operation of the penal statute concerning lotteries. Since the constitution expressly prohibits lotteries it is clear that if "Bank Nights" were declared

¹¹ Retail Section of Chamber of Commerce of Plattsmouth v. Kieck, 128 Neb. B. 257 N. W. 493 (1935).

¹² State v. Big Chief Corp., — R. I. —, 13 A. (2d) 236 (1940).

¹³ Central States Theatre Co. v. Patz, 11 Fed. Supp 566 (1930); Grimes v. State, 235 Ala. 192, 178 So. 73 (1938); Gulf Theatres v. State, 135 Fla. 850, 185 So. 862 (1939); Affiliated Enterprises v. Waller, — Del. —, 5A (2d) 257 (1939); State v. Fox Kansas Theatre Co., 144 Kan. 687, 62 P. (2d) 929; State v. Ewan, 20 S. W. (2d) 1098 (Mo. 1938); State v. Fox Missoula Theatre Corp., — Mont. —, 101 P. (2d); 1065 (1940); Commonwealth v. Lund, — Penn. —, A (2d) 839 (1940); Troy Amusement Co. v. Attenweiler, 64 Ohio App. 105, 28 N. E. (2d) 207 (1940); McFadden v. Bain, 162 Oregon 250, 91 P. (2d) 292 (1939); Cole v. State, 133 Tex. Cr. Rep. 548, 112 S. W. (2d) 725 (1938); State v. Wilson, 109 Vt. 439, 196 Atl. 757 (1939).

¹⁴ Commonwealth v. Payne, — Mass. —, 29 N. E. (2d) 709 (1940); Little River Theatre Corp. v. State, 135 Fla. 854, 185 So. 855 (1939).

¹⁵ Grimes v. State, 235 Ala. 192, 178 So. 73 (1938); see Little River Theatre Co. v. State, 135 Fla. 854, 185 So. 855, 861 (1938).

¹⁶ Regez v. Blumer, 236 Wis. 129, 294 N. W. 491 (1941).

¹⁷ Affiliated Enterprises v. Waller, — Del. —, 5 A. (2d) 257 (1939).

¹⁸ *Supra*, n. 17 at 260.

a lottery that the legislature could make no exceptions by statute. In the State of Washington the constitution prohibited lotteries and the penal statute passed to give effect to that provision of the constitution made an exception as to lotteries for charitable purposes. It was held that the constitutional provision admitted of no exceptions.¹⁹ The Louisiana Court,²⁰ and the Oregon Court²¹ under constitutional provisions, similar to ours, held that insofar as the legislature attempted to license games which were by the court declared to be lotteries that part of the license law was of no effect although the rest should stand.²²

An objection might be made, that if the provision of the 1938 statute authorizing "Bank Night" is invalid then the whole statute falls. This contention might be met in two ways. First, by saying that even though part of the statute is invalid it will not fall entirely unless the invalid part is inseparable.²³ Secondly, it is to be observed that the statute of 1938 contains no repealing clause and that repeal by implication is never effected by an invalid statute. Therefore, on either supposition there is a statute under which to prosecute, namely: under the valid portion of the 1938 act, or if that act is wholly unconstitutional then under the act of 1892.

A clear majority of jurisdictions that have passed on this question have found "Bank Nights" to be a lottery.²⁴ Furthermore, in every case in which "Bank Night" was held not to be a lottery no constitutional provision was involved.²⁵ On the other hand in every case where the constitution was involved "Bank Night" has been declared illegal.²⁶

¹⁹ *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324 (1898). See also *Lee v. Miami*, 121 Fla. 93, 163 So. 486 (1935).

²⁰ *State v. Barbee*, 187 La. 529, 175 So. 50 (1937).

²¹ *State v. Coates*, 158 Oregon 122, 74 P. (2d) 1102 (1937).

²² In 1940 the Kentucky legislature passed an act taxing the receipt of "Bank Night" awards, Kentucky Statutes (Carroll, 1936-1940 Supp.) sec. 4281f-23.

²³ *Grant v. Leavell*, 259 Ky. 267, 82 S. W. (2d) 283 (1935); *State Board of Education v. Coleman*, 235 Ky. 24, 29 S. W. (2d) 619 (1930).

²⁴ *Supra*, n. 13.

²⁵ *Supra*, n. 10.

²⁶ *Grimes v. State*, 235 Ala. 192, 178 So. 73 (1938); *Affiliated Enterprises v. Waller*, — Del. —, 5 A. (2d) 257 (1939); *State v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. (2d) 929; *Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 28 N. E. (2d) 207, (1940); *McFadden v. Bain*, 162 Ore. 250, 91 P. (2d) 292 (1939); *Cole v. State*, 133 Texas Cr. Rep. 548, 112 S. W. (2d) 725 (1938).

It is submitted that "Bank Night" as authorized by the Kentucky statute is a lottery and that in light of the decisions cited above, there are ample reasons for so holding. The Court could and should find that in fact consideration does move from those eligible to participate since one must buy a ticket to win. Or the Court might follow the Delaware theory and hold that attendance at the theatre is sufficient consideration. Furthermore, the court could take the realistic view of the situation, and looking through the apparent benevolence of the operator in giving away a huge cash prize, find that the operation really is for profit.

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